APPENDIX C

RECONSIDERATION OF ARBITRATION AWARD MANDATED BY OFFICE OF PERSONNEL MANAGEMENT UNDER 5 USC & 7703 (d) AND 7121 (f)

In the Matter of:	*
	*
United States Department of	*
Housing and Urban Development	*
	*
and	*
	*
Richard Frazier	*
Grievant	*

Federal Mediation and Conciliation Service

Arbitration #92-05883
December 9, 1992

Arbitrator:
Joseph Glasser
15 Westwood Road
Storrs, CT 06268

Date of Report:
October 19, 1993

PREFATORY STATEMENT

The arbitrator has been petitioned to reconsider his arbitration award given in the Federal Mediation and Conciliation Service Arbitration #92-05883, by the Office of Personnel Management, under the authority granted it by 5 USC §7703 (d) and 7121 (f).

The Arbitrator's Decision and Award reads as follows:

> The grievant is not guilty of sexual harassment, so that the 60-day suspension was not for just cause.
>
> The record of this disciplinary action should be expunged from the personnel file of the grievant and the agency is to make the grievant whole for any pay and benefits lost during the 60-day period of suspension.

The Office of Personnel Management has submitted its brief in support of its petition for reconsideration. The attorney that represented the grievant during the arbitration hearing has submitted a reply brief in opposition to the Office of Personnel Management's Petition for Reconsideration.

5 USC §7703 (d) and §7121 (f) state in effect that if OPM determines that the arbitrator has erred in interpreting a civil service law, rule, or regulation effecting personnel management and that the arbitrator's decision will have a substantial impact on a civil service law, rule, regulation or policy direction, OPM can petition the arbitrator for a reconsideration of his decision.

ARBITRATOR'S ANALYSES OF THE BRIEF IN SUPPORT OF THE OFFICE OF PERSONNEL MANAGEMENT'S PETITION FOR RECONSIDERATION

Under the heading "Background" the brief states "-- OPM has determined that the arbitrator's award in this case erroneously interpreted civil service laws, rules, or regulations affecting personnel management and that this erroneous award would have a substantial impact on civil service law". It would have been expected that this brief would have informed the arbitrator which civil service laws, rules, or regulations the arbitrator has erroneously interpreted. It did not do so.

Pages 2 to 9 of the OPM brief is under the heading "Facts." Much of this descriptive narrative relates to evidence presented by the Agency in its report of its investigation into this matter as well as evidence presented by witnesses who testified at the arbitration hearing.

The OPM brief then presented what it felt were statements made by the arbitrator. In so doing, it omitted significant words, so that in its paraphrasing of the arbitrator's statements, it has completely changed the meaning ascribed to the event by the arbitrator. For example the brief states, "The arbitrator did find evidence that the grievant certified that he read the summary of the agency's standard of conduct distributed on November 4, 1981. He (the grievant) had certified in writing that he had read the document." This is only partially correct. Much of what appears in the brief does not reflect what the arbitrator had written.

There is evidence (Exhibit 5-9) although not presented by the agency, so that its full meaning cannot be determined and its import could not be evaluated by the arbitrator because it was not open to examination by the

grievant's attorney, that Mr. Frazier (grievant) certified that he had "read the Summary of Standards" distributed at a meeting (dated) Nov. 4, 1981). It is presumed by the arbitrator that this may refer to Exhibit 5-7 which refers to a "Policy Statement and Definition of Sexual Harassment dated March 7, 1980. The arbitrator can only make a presumption because there was no reference to this exhibit during the arbitration hearing--".

The OPM sentence in the brief "The arbitrator did find evidence that the grievant certified that he had read the summary of the agency's standard of conduct distributed on November 4, 1981, is totally incorrect, because the arbitrator did not find evidence, he only presumed that a linkage could have been possible, but the agency made no attempt to prove the point at the hearing.

The first argument in the OPM brief is "The arbitrator erred in departing from the "Efficiency of the Service Standard set forth in 5 USC § 7513 and substituting in its place a standard of proof applicable to criminal proceedings. He further erred by requiring the agency to prove the appellant's wrongful intent."

It seems that the OPM is relying heavily for its argument on its misreading of what the arbitrator actually writes in his award. Earlier it was "The arbitrator did find evidence--" and in this section (P10) "--he (the arbitrator) concluded that, even though the grievant had signed a statement that re read, among other things, the agency's policy prohibiting sexual harassment the importance ascribed to such a document by management approaches zero." The arbitrator states "The only evidence presented by the agency----- was the signed statement that Mr. Frazier certified that he had read some documents given to him. Even this evidence as presented without being given any attention by the agency's attorney during the hearing lacks

great credibility as to what was read--". This differs greatly from the OPM's version of what the arbitrator had written.

The OPM brief makes the statement "The arbitrator's award is replete with analytical contradictions and it follows illogical pathways, but this is all besides the point. Even though the writer of the OPM brief indicates "but this is all beside the point," he dignifies the sentence with a footnote which is totally irrelevant to the argument made. "Some people do no act in a boorish and disgraceful manner only when they are unable to discern the difference between right and wrong, and may behave that way because they like it." This was preceded by an analogy with John Dillinger robbing banks as its central theme.

The OPM brief contains a footnote on P. 11 citing Vaughan v Dept of Navy, "The MSPB specifically held that where an agency charges an employee with sexual harassment under its own regulation, and the employee "had the regulation and had the opportunity to read it and govern his conduct accordingly --(h) is failure to do so does not excuse his misconduct." As has previously been written by the arbitrator, the agency (HUD) never presented its evidence at the arbitration hearing that, in fact the agency had issued the agency's policy on sexual harassment to the grievant.

The OPM brief in its argument stresses that the arbitrator erred in departing from the "Efficiency of the Service" standard when it is applied in the case of an employee's misconduct." The OPM brief cites from Cooper v United States," that an agency must make a determination that there is a nexus (a connection-added by OPM) between the employee's misconduct and the efficiency of the service. The agency (HUD), at no time, during the arbitration hearing, even referred to the concept of "that there is a nexus between the employee's misconduct and the

efficiency of the service," let alone even refer to the words "efficiency of the service."

The OPM, on P. 11 further states "The agency is not required to serve a list of proscribed conduct on employees and, if it chooses to do so, employees are not required to understand it as a prerequisite to their being disciplined." This cavalier statement which I presume is the position of the OPM and not just that of the attorney preparing the brief, because the signatures of the Assistant General Counsel and Deputy General Counsel have been offered to the brief, smacks of the doctrine of Sovereignty. this position was taken by government agencies whenever arbitrary and capricious acts were committed by agency management personnel in its relations with its employees. It should be brought to the attention of OPM, as they provide counsel for management for federal agencies, that the doctrine of sovereignty, that the government (represented by agency management), can do no wrong, has given way to the collective bargaining process. Further, that if an agency management, through its arbitrary and capricious or improper action, impugns the process of collective bargaining, the Supreme Court has "concluded that"--Penalizing the agency for disregarding procedural protections of the collective bargaining agreement is proper." This is from Cornelius v Nutt.

The OPM brief cites Murray v. Department of the Army 255 "that statutory provisions of 5 USC § 7513 (a) do not require that misconduct charges result from wrongful intent, but to the contrary, permits removal for such course as well promote the efficiency of the service." The agency in applying its discipline did not produce any evidence during the arbitration hearing how the discipline given the grievant would promote the "efficiency of the service."

Another citation from Murray v. Department of the Army (250,255) should be brought to the attention of the

OPM, "the MSPB held that "employee lacked requisite intent to commit falsification offense due to her mental illness." The arbitrator sees this ruling as applying directly to the matter of the arbitration. The MSPB upheld the judge's ruling in this cited case, that the person charged with committing the falsification offense did not realize (lacked the requisite intent) due to her mental illness. In the cited case, even though the person committed the alleged action (falsification of accusation) the person was not guilty of this action because she did not know that she was committing an unacceptable and punishable act. In the case heard at the arbitration, the arbitrator ruled that even though the grievant did in fact make statements that could be considered "notoriously disgraceful conduct," the arbitrator believed that he did not know his conduct was sexual harassment (similar to "lacked the requisite intent"). In the cited case, the judge did not sustain the charge that the appellant made false accusations was proper and this decision was upheld by the MSPB. In the arbitration case, the arbitrator did not sustain the charge that the grievant was guilty of sexual harassment was proper.

The OPM brief on P. 13 and 14, contains argument that is not the purview of the OPM. The material contained in this section is not argument relating to whether the arbitrator erred in his award. This material is what should have been presented by the agency in its defense of its disciplinary action at the arbitration hearing for the arbitrator's evaluation of the agency's position.

The second argument presented in the OPM brief is "Even if the agency had charged the grievant with sexual harassment under its own policy the arbitrator's own findings and conclusions require the sustaining of the agency's imposition of discipline in this case" or as stated in the "Issues" section P. 8, "requiring the sustaining of the agency's action." The arbitrator has provided both the issue and the argument because "sustaining the agency's

imposition of discipline" and "sustaining the agency's action" can be considered to be two different issues. For this reconsideration, it is the issue "sustaining the agency's action" which is to be given attention.

The OPM brief cites Nikovitz v Veterans Administration and the MSPB decision in this case. The facts in this case are significantly different from the case at issue in that it involved physical contact of a sexual nature toward a co-worker, therefore its findings cannot be considered relevant to this case.

The third argument of the OPM brief, "The evidence of the record and the arbitrator's own findings and conclusion would require sustaining the agency's imposition of discipline in this case". The phrase "the agency's imposition of discipline" is inferred to mean "the agency's imposition of a 60-day suspension". The Supreme Court in Meritor Savings Bank v V inson states "For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of (the victim's) employment and create an abusive working environment". The Court further stated that "the EEUC Guidelines" emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and the "totality of circumstances".

The OPM brief is incorrect in its assessment of the arbitrator's report. A reading of the arbitrator's report will show that the arbitrator reflected on "the record as a whole" as trier of fact. From evidence presented at the hearing, the arbitrator had concluded that "There is no doubt that the verbal statements by Mr. Richard Frazier to the witnesses could be perceived by most as no less than notoriously degraceful conduct". The arbitrator also stated "Whether the grievant said what he said as often as it was thought by some of the witnesses or whether the effect on the witnesses was as devastating to some of the witnesses as

was claimed to have been the case, is not material". The arbitrator now must concede that he erred, he should have stated "is material" in the light of the preceding quotes from Meritor Savings Bank v Vinson. Further examination of the record, will show that the witness initiating the agency action (Myrta Hernandez) did not act in a timely manner in that the filing of her complaint against the grievant was not timely relative to the occurrence of the alleged misconduct of the grievant, but was filed shortly after the complainant admitted to having acted in an insubordinate manner toward the grievant who had given the complainant a legitimate order while in the capacity of an acting supervisor.

None of the agency's witnesses who testified against the grievant (Mr. Richard Frazier) claiming that he had made verbal statements that they felt were offensive, ever brought the matter to the attention of any supervisor. The reason for this was never raised during the arbitration hearing by either party. Why the witnesses never brought the actions of the grievant to the attention of their supervisors remained unanswered, but the conjecture of the arbitrator raised three possibilities: one, that the statements by the grievant to the witnesses (including the complainant) were not felt by them to be sufficiently abusive to take issue, the second, that the agency had not made employees aware that channels for complaint were available for them to make complaints, third, that even if the witnesses were aware of the channel through which complaints could be made, they may have felt that their supervisors would do nothing. Further, the agency, at no time during the arbitration hearing, brought forth evidence that it provided orientation sessions to make employees aware of public policy regarding sexual harassment and the disciplinary consequences of improper conduct by employees.

The arbitrator, has complied with the Supreme Court reiteration of the EEOC Guidelines "that the trier of fact must determine the existence of sexual harassment in

'the light of the record as a whole' and 'the totality of circumstance--'".

The OPM brief cites Intlefoker v Turnage, "Federal agencies are required to take steps to eliminate Title VII sexual harassment through appropriate disciplinary action." If the OPM attorney who prepared this brief had even looked at the first page of the Federal Reporter's synopsis of this case, he would have realized that the facts of the case have no relevancy to those of the case heard by the arbitrator. The ruling of the case Circuit Court in this case was to overrule a District Court finding, that a federal agency had met its obligation to take prompt and appropriate remedial action designed to end sexual harassment. The Circuit Court ruled that the action taken by the federal agency was inappropriate. The Circuit Court holding in Ellison v Brady "which established standard by which employees actions are measured when deciding whether employee is liable for sexual harassment by employee, applies retroactively as employers have long been on notice that they were required under Title VII to intervene promptly and effectively to put an end to workplace sexual harassment." The OPM's brief states "The arbitrator's award and its underlying premise prevent the agency in this case from carrying out its obligations to its employees under Title VII." How can the OPM make this claim when the agency by its own admission (through witnesses who claim they have been subjected to verbal abuse since 1977), has done nothing "to intervene promptly and effectively to put end to workplace sexual harassment." The agency could have done this many years ago by insuring that all of its employees fully understood what is sexual harassment and informing its women employees that anyworkplace sexual harassment should be promptly brought to the attention of management.

CONCLUSION

The arbitrator has carefully considered and evaluated every point in the brief in support of the Office of Personnel Management's Petition for Reconsideration. The arbitrator finds that the conclusion drawn by OPM, "the award is incompatible with Federal civil service law, and should be reversed upon reconsideration" is incorrect. Further, the OPM request that the arbitrator "vacate his decision, reinstate the agency's action and dismiss the grievance" to be inappropriate.

Response to OPM request for reconsideration

Upon reconsideration of all issues brought before him, the arbitrator upholds his initial decision and award in the matter of United States Department of Housing and Urban Development and Richard Frazier, Grievant, Federal Mediation and Conciliation Service Arbitration #92-05883.

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Joseph Glasser

APPENDEX D

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MISCELLANEOUS DOCKET NO. 389

JAMES B. KING, Director.
Office of Personnel Management,

Petitioner,

v.

RICHARD I. FRAZIER,

Respondent.

ORDER

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS FOR THE FEDRAL CIRCUIT

MISCELLANEOUS DOCKET NO. 389

JAMES B. KING, Director,
Office of Personnel Management,

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v.

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Respondent.

ON PETITION FOR REHEARING

Before ARCHER, Chief Judge, COWEN, Senior Circuit Judge, and RADER, Circuit Judge.

RADER, Circuit Judge.

ORDER

The Office of Personnel Management (OPM) petitions for rehearing of the court's order denying its petition for review of an arbitrator's decision reversing the Department of Housing and Urban Development's (HUD) 60-day suspension of Richard L. Frazier. OPM also submits additional authority in support of its petition for rehearing,. Richard L. Frazier opposes.*

*The court also received two submissions from the arbitrator. However, because the arbitrator is not a party to these proceedings, the court will not consider these submissions.

This court has the duty to independently assess whether an exercise of our discretionary jurisdiction is warranted "because the decision will have a substantial impact on civil service law." Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983). In our initial order, this court denied OPM's petition for review because we were "not persuaded that the decision will have the requisite substantial impact" as required by 5 U.S.C. § 7703 (d). We stated in relevant part:

> Importantly, it appears that HUD, at least tacitly, agreed to the standards and burdens of proof that were presented in the arbitration proceeding.... Here, the decision of the arbitrator stemmed from the parties' formulation of the issues and presentation of their cases. OPM cannot argue that the decision will have a substantial impact when the agency agreed to the terms of the hearing.

OPM argues that rehearing should be granted based on three grounds: (1) the Civil Service Reform Act and this court's precedent "permit the OPM, because of its important role as the overseer of the Federal Personnel system, to assert errors in an arbitrator's decision even if those errors were not raised by the agency in the initial arbitration hearing;" (2) the arbitrator's conclusions "with respect to sexual harassment in the workplace do not comport with Supreme Court precedent, and, therefore, place civil service law at odds with Title VII of the Civil Rights Act of 1964;" and (3) because of this court's intervening case on sexual harassment, King v. Hillen, 21 F. 3d 1572 (Fed. Cir. 1994).

In response, Frazier argues that OPM's cited authorities are not on point because they pertain to the liability of an employer, not to the discipline of an offending employee. Frazier also reasserts his argument that the arbitrator's decision will have minimal impact upon civil service law.

With regard to OPM's first argument, the language of our earlier order suggested that OPM is estopped from arguing that the agency's conduct is formulating the issues and its agreement to the burdens of proof was error. OPM argues here that is not barred from taking a position contrary to that of the agency. We are not persuaded that OPM's argument is entirely on point. We note that the initial order focused on the agency's stipulation adopting the just cause standard and the agency's litigation choices, not on legal issues concerning sexual harassment. However, this court has recognized that OPM, on reconsideration and before this court, is not barred from raising an issue that an agency failed to raise. See Newman v. Corrado, 897 F.2d 1579, 1582 (Fed. Cir. 1990); Devine v. Levin, 739 F.2d 1567, 1570 (Fed. Cir. 1984). Regardless of the efficacy of this argument of OPM, we agree that rehearing is warranted because of the reasons discussed below.

We next consider OPM's arguments regarding the alleged inconsistency between the arbitrator's decision and Supreme Court precedent interpreting Title VII prohibitions against sexual harassment, and the impact of Hillen. After the issuance of the court's initial order, the court decided Hillen, a case setting forth the standards for analyzing whether sexual harassment occurred in the workplace. In Hillen, the court applied the Supreme Court's analysis in Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993) which required "both an objective reasonableness standard in evaluating the conduct and its effect on the work environment and also considers the subjective perception of the victim."

The arbitrator's decision reversed the agency's 60-day suspension and determined that Frazier was "not guilty of sexual harassment." The arbitrator based his award, inter alia, on the following findings:

> There was no evidence presented that any supervisory personnel ever brought to the grievant's attention that his conduct was unacceptable, and that his statements were considered to be sexual harassment.
>
> In the arbitrator's opinion, Mr. Frazier did not know right from wrong; that his conduct was contrary to public policy, let alone that his sexually explicit statements directly made to a number of women exhibited notoriously disgraceful conduct or even that his several outbursts in the office, sexually describing women passing outside and his desires as they pertained to these women were unprofessional and lacked good taste.

The arbitrator determined that "the verbal statements made by Mr. Frazier to the witnesses could be perceived by most as no less than notoriously disgraceful conduct," and that "sexual harassment is whatever is perceived by the person who is subjected to the sexually explicit statements of another." Nevertheless, the arbitrator concluded that Frazier was "not guilty" of sexual harassment because of his alleged ignorance regarding the wrongfulness of his behavior and the lack of evidence indicating that management informed Frazier of the penalties that the agency could invoke as a result of his conduct. Given the court's recent elucidation of the standards governing sexual harassment in the workplace, the court should have the opportunity to consider the arbitrator's decision in light of the Hillen standards.

Because of the court's intervening case law and our consideration of the issues raised by OPM's petition for rehearing, we conclude the OPM's petition for review of the arbitrator's decision should be granted.

Accordingly,

IT IS ORDERED THAT:

OPM's petition for rehearing is granted. The court's initial order is vacated.

FOR THE COURT

Date

Randall R. Rader
Circuit Judge

cc: Ross D. Cooper, Esq.
Otto P. Witt, Esq.

s6